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Responding to the Issue of "Driving While Black": A Plan for Community Action through Litigation and Legislation

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RESPONDING TO THE ISSUE OF "DRIVING WHILE BLACK": A PLAN FOR COMMUNITY ACTION THROUGH LITIGATION AND LEGISLATION

Scott Moriarity[†]

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I. INTRODUCTION

Blacks and other minorities often find that they are stopped by police without cause, simply for "driving while black."¹ Once disregarded by police and mainstream media, the issue is now the focus of media attention and public debate.² Racial profiling on vehicular stops cannot be limited to a few isolated incidents.³ It has a

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1. See generally David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 266-67 (1999) [hereinafter Harris, *Driving While Black*].

2. See generally Michael A. Fletcher, *Driven to Extremes; Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 26, 1996, at A1; Carl Ingram, *Alleged Race Profiling Is Targeted*, L.A. TIMES, Apr. 3, 2000, at A3; Brad Knickerbocker, *New Face of Racism in America*, CHRISTIAN SCIENCE MONITOR, Jan. 14, 2000, at 1; Julie N. Lynem & Marshall Wilson, *When Police Stop People for "Driving While Black"*, S.F. CHRON., Apr. 7, 1999, at A1; James Walsh & Dan Browning, *Presumed Guilty Until Proven Innocent*, STAR TRIB., July 23, 2000, at A1. For a broader, frequently updated survey of local media coverage of the issue, see American Civil Liberties Union, *Racial Profiling in America*, available at http://www.aclu.org/profiling/news_archive.html (last modified Sept. 26, 2000).

3. Harris, *Driving While Black*, *supra* note 1, at 288.

broad impact on all communities of color, both in terms of police treatment⁴ and community attitudes toward police.⁵

Perhaps the earliest incident to highlight the issue involved Robert Wilkins, a black attorney and public defender.⁶ Wilkins and his family were stopped by an officer of the Maryland State Police in 1993.⁷ They were held until a drug-sniffing dog was brought and then were ordered out of the car.⁸ The car was searched without consent.⁹ Finding nothing, the group was released after the driver was issued a speeding ticket.¹⁰ When Wilkins subsequently brought action, a 1992 police report was found; it directed officers to watch for "dealers and couriers (traffickers) [who] are predominantly black"¹¹ After the parties reached a settlement, the Maryland State Police agreed to stop using racial profiles and to compile race statistics on its stops.¹² But subsequently these statistics have been broadly cited as evidence of racial profiling.¹³

Further investigation has revealed the scope of the problem. In New Jersey, the United States Department of Justice brought action in response to allegations of racial profiling.¹⁴ Statistical studies, among the most comprehensive on the issue, showed serious problems with racial profiling in the state.¹⁵ Then, in an unprecedented admission, New Jersey governor Christine Whitman ac-

4. *Id.* at 275-288 ("The Statistical Analysis"); DAVID A. HARRIS, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS 27-35 (1999), available at <http://www.aclu.org/profiling/report/index.html>. This paper will not review statistical proof of racial profiling on vehicular stops.

5. Harris, *Driving While Black*, *supra* note 1, at 298-99; Frank Newport, *Racial Profiling Is Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE, Dec. 9, 1999, available in part at <http://www.gallup.com/poll/indicators/indraces.asp>.

6. David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 563-64 (1997).

7. *Id.* at 564.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 565 & n. 126.

12. *Id.* at 565.

13. HARRIS, *supra* note 4, at 32-35; Harriet Berovick, *DWB: Driving While Black: Incidents in New Jersey and Maryland Heat Up the Issue of Racial Profiling by State Highway Patrols*, TIME, June 15, 1998, at 35; Editorial, *Evidence Mounts That Police Target Minorities Excessively*, USA TODAY, June 3, 1999, at 14A.

14. Iver Peterson, *Whitman Says Troopers Used Racial Profiling*, N.Y. TIMES, Apr. 21, 1999, at A1.

15. Harris, *Driving While Black*, *supra* note 1, at 277-280.

knowledge that racial profiling had occurred.¹⁶ Two state troopers were also indicted for concealing a disproportionate number of race-based stops.¹⁷ As a result, New Jersey adopted several initiatives to combat racial profiling.¹⁸

As public awareness of racial profiling has increased, government has responded in varying degrees. For example, within the last year more than 100 police agencies began voluntary collection of race data on persons who are stopped or searched.¹⁹ Several states have considered or passed legislation against racial profiling.²⁰ The issue has inspired studies and legislation at the federal level.²¹ President Clinton issued an executive order requiring federal law enforcement agencies to end racial profiling and to collect race data on searches and seizures.²²

Clearly, racial profiling is an important issue. Now, the legal community must formulate a response to the problem. Part of this response is to identify those affected by racial profiling. Thus, Part II looks at the "model plaintiff," reviewing the extent of police power on vehicular stops. Part III provides some possibilities for litigation, focusing on major theories for action in federal courts, as well as resolution in settlement. Part IV discusses legislative approaches, using recently passed legislation in Missouri as a model. The scope of this survey is limited; success requires a broad array of options. Thus, to resolve the problem, open dialogue is critical. A working solution should involve police, civil rights advocates, and the communities they serve.

16. Peterson, *supra* note 14, at A1.

17. *Id.*

18. Jerry Gray, *New Jersey Plans to Forestall Suit on Race Profiling*, N.Y. TIMES, Apr. 30, 1999, at B13.

19. David Chanen, *Patrol May Study Role of Race in Road Stops*, STAR TRIB., Mar. 2, 2000, at 1B.

20. Harris, *Driving While Black*, *infra* note 1, at 321-22. See also *supra* note 273 and accompanying text.

21. See generally Traffic Stops Statistics Study Act of 1999, H.R. 1443, 106th Cong. (2000); *Data Collection: The First Step in Coming to Grips with Racial Profiling*, Hearing on S.B. 821 Before the Senate Subcomm. on the Constitution, Federalism and Property Rights, 106th Cong. (2000); UNITED STATES GENERAL ACCOUNTING OFFICE, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS (2000), available at <http://www.gao.gov/new.items/gg00041.pdf>.

22. Memorandum on Fairness in Law Enforcement, 35 WKLY COMP. PRES. DOC. 1067 (June 9, 1999).

II. THE "MODEL PLAINTIFF"

Racial profiling causes disproportionate law enforcement against persons of color.²³ As a result, ordinary, law-abiding citizens of color are more likely to be subject to unnecessary stops.²⁴ These persons are the "model plaintiffs," subject to greater suspicion merely on the basis of race.

Before examining the extent of police powers when the model plaintiff is stopped, a closer look at the hypothetical circumstances is required. First, the stop is an ordinary traffic stop.²⁵ The plaintiff has not committed any crime other than a possible traffic violation. Once stopped, the plaintiff follows police instructions. The stop fails to reveal any probable cause to arrest the plaintiff. Later, the plaintiff is released, perhaps with a traffic citation. In the course of this transaction, a police officer holds extensive power over the model plaintiff. Nevertheless, there are limits on the power of police, and encroachment on these limits may indicate racial profiling.

The encounter begins when a police officer decides to pull over the plaintiff. In *Whren v. United States*,²⁶ the Supreme Court held that an officer can pull over any vehicle for a traffic violation, regardless of the subjective reason for the stop.²⁷ Thus, a traffic violation is a valid pretext for a stop, even though an officer's suspicion arises on other grounds.²⁸ Because nearly all drivers commit traffic violations, this rule allows police to initiate encounters with minority drivers at their own discretion, with potential for discrimi-

23. See Harris, *Driving While Black*, *supra* note 1, at 275-88 ("The Statistical Analysis").

24. *Id.* at 290-91.

25. Although a traffic violation is probable cause for a traffic stop, the violation is not probable cause for custodial arrest. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3 (3d ed. Supp. 2000). Instead, traffic stops are characterized as investigatory stops, under the standard set by *Terry v. Ohio*, 392 U.S. 1 (1968). *E.g.*, *United States v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 1207 (2000); *Valance v. Wisel*, 110 F.3d 1269, 1276 (7th Cir. 1997); *United States v. Shareef*, 100 F.3d 1491, 1500 (10th Cir. 1996); *see also* *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (dictum) (finding a traffic stop "more analogous" to an investigatory stop than to an arrest); *United States v. \$404,905.00 in U.S. Currency*, 182 F.2d 643, 648 (8th Cir. 1999). Because of this characterization, an investigatory stop—on grounds of "reasonable, articulable suspicion" of criminal activity, — would not alter the analysis of the model plaintiff's circumstances. *Terry*, 392 U.S. at 21.

26. 517 U.S. 806 (1996).

27. *Id.* at 813.

28. *Id.* at 812-13.

nation against blacks or hispanics.²⁹ At this point during the encounter, the model plaintiff has few grounds for complaint, even if racial profiling has occurred.

Once the plaintiff has pulled over, an officer has several basic investigatory techniques at his disposal. The officer may request the plaintiff's license and registration.³⁰ In addition, the officer may ask questions related to the encounter, such as the vehicle's destination and purpose.³¹ If contraband is in "plain view," and its illegal nature is "readily apparent," then the officer may seize the item.³² At night, "plain view" can be aided by a flashlight.³³

Yet this is only the beginning of many significant intrusions the officer can impose during the stop. For example, the officer has power to order the driver or passengers to get out of the vehicle.³⁴ The officer may also ask to search the vehicle. If the plaintiff consents, then the search is allowed.³⁵ Furthermore, the officer does not need to advise the plaintiff that consent can be withheld.³⁶ Thus, commentators have noted that in the tense environment of a police stop, consent to search is given without an understanding of the rights conferred.³⁷ Also, courts often find consent, even though the driver exhibited distress when it was given.³⁸

These examples sketch out some elements of police power during a stop. The permissible scope of these powers is guided by

29. David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 560-61 (1998) [hereinafter Harris, *Car Wars*]; David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, SUP. CT. REV. 271, 309 (1997); Chris K. Visser, Comment, *Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?*, 35 HOUS. L. REV. 1683, 1710 (1999).

30. *United States v. Foley*, 206 F.3d 802, 805 (8th Cir. 2000); *United States v. Shareef*, 100 F.3d 1491, 1501 (10th Cir. 1996); *United States v. Diaz-Lizaranza*, 981 F.2d 1216, 1221 (11th Cir. 1993).

31. *E.g., Foley*, 206 F.3d at 805; *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir. 1994), *cert. denied*, 511 U.S. 1095 (1994).

32. *Horton v. California*, 496 U.S. 128, 136-37 (1990).

33. *Texas v. Brown*, 460 U.S. 730, 739-40 (1983) (plurality opinion).

34. *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

35. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

36. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). If the plaintiff later contests the search, the government has the burden to prove the plaintiff consented. *Schneckloth*, 412 U.S. at 222.

37. Harris, *Car Wars*, *supra* note 29, at 571; Visser, *supra* note 29, at 1721-22.

38. *United States v. Wellman*, 185 F.3d 651, 656-57 (6th Cir. 1999); *Valance v. Wisel*, 110 F.3d 1269, 1279-80 (7th Cir. 1997). *But see United States v. Dortch*, 199 F.3d 193, 201-02 (5th Cir. 1999) (finding consent was involuntary where earlier refusals of consent were disregarded).

the "objective reasonableness" test. First defined by the Supreme Court in *Terry v. Ohio*,³⁹ the test has two parts: (1) "whether the officer's action was justified at its inception," and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place."⁴⁰ Since the rule in *Whren* effectively justifies any traffic stop "at its inception,"⁴¹ the principal inquiry is whether the actions were "reasonably related in scope."

For a stop to be reasonable, many courts have indicated that the stop should be brief, and carried out in the least intrusive manner available.⁴² But in recent decisions, when the Supreme Court defines reasonableness, it included the concerns of the government and the general public, not just the individual. In *United States v. Sharpe*⁴³ the Court noted, "While it is clear that the brevity of the invasion of the individual's Fourth Amendment interests is an important factor ... we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes."⁴⁴ In particular, "law enforcement purposes" have included police safety,⁴⁵ as well as the general public interest served by vigorous drug enforcement.⁴⁶ Without a more rigid test for reasonable police conduct,⁴⁷ these interests create a rationale for further intrusions by police during

39. 392 U.S. 1 (1968). *Terry v. Ohio* did not involve a vehicular stop. Rather, it defined police powers for a "stop and frisk" encounter on the street. *Id.* at 12. The limitations articulated in the case were subsequently adopted for investigatory vehicular stops and traffic stops. *E.g.*, *Dortch*, 199 F.3d at 198, *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Hill*, 198 F.3d 258, 264 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 1207 (2000); *United States v. Salzano*, 158 F.3d 1107, 1111 (10th Cir. 1998); *Valance*, 110 F.3d at 1276; *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir. 1994), *cert. denied*, 511 U.S. 1095 (1994).

40. *Terry*, 392 U.S. at 20.

41. *Supra* text accompanying notes 26-29.

42. *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion); *United States v. Foley*, 206 F.3d 802, 806 (8th Cir. 2000); *Hill*, 198 F.3d at 267.

43. 470 U.S. 675 (1985).

44. *Id.* at 685 (citation omitted) (internal quotation marks omitted).

45. *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998).

46. *United States v. Place*, 462 U.S. 696, 704 (1983); *see also* *United States v. Serna-Baretto*, 842 F.2d 965, 967 (7th Cir. 1988) (noting "interest of the community in being free from menace of crime").

47. *Sharpe*, 470 U.S. at 685, 686. In *Sharpe*, the Court refused to promulgate a "bright line" test for the length of an investigatory stop. *Id.* However, the Court's premise was to avoid any strict guideline for reasonableness, because discrete limits "would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation." *Id.* (quoting *Place*, 462 U.S. at 710 n. 10).

traffic stops.⁴⁸

For example, during the model plaintiff's traffic stop, the officer may have a drug-sniffing dog examine the vehicle. The Supreme Court has already determined that a drug dog "sniff" is not a "search" covered under the Fourth Amendment.⁴⁹ Instead, a drug dog's intrusion was deemed minimal.⁵⁰ As a result, police are able to conduct a drug dog sniff during the course of any traffic stop.⁵¹

Usually, once the traffic stop is completed, a motorist cannot be detained for a drug dog sniff unless the officer has a reasonable, articulable suspicion of criminal activity.⁵² However, in *U.S. v. \$404,905.00 in U.S. Currency*,⁵³ the Eighth Circuit Court of Appeals may have cast doubt upon the reasonable suspicion requirement. It noted that when a driver violated a traffic law, he "subjected himself and his vehicle to a period of official detention that might have substantially exceeded the five to eight minutes it took [the officer] to complete the traffic stop."⁵⁴ Thus, it permitted a drug dog sniff, without reasonable suspicion, immediately after the traffic stop was complete.⁵⁵ "[T]he two-minute canine sniff was a de minimis intrusion on [the driver's] personal liberty, like routinely ordering a lawfully stopped motorist out of his vehicle to protect officer safety"⁵⁶ The Court cited the government's "strong interest in interdicting the flow of illegal drugs along the nation's highways."⁵⁷

So much weight is accorded to drug interdiction and police

48. See generally Thomas Fusco, Annotation, *Permissibility Under Fourth Amendment of Detention of Motorist by Police, Following a Lawful Stop for Traffic Offense, to Investigate Matters Not Related to Offense*, 118 A.L.R. FED. 567 (1994).

49. *Place*, 462 U.S. at 707.

50. *Id.*

51. *E.g.*, *United States v. Dortch*, 199 F.3d at 200. In *Dortch*, a police officer detained a motorist so that a drug dog could sniff the vehicle. Finding that there was no reasonable, articulable suspicion to justify the detention, the detention and subsequent dog sniff were found unconstitutional. However, the court noted that the dog sniff, "if performed during the [traffic stop], would not have violated *Dortch's* constitutional rights, because it is not a search under the Fourth Amendment." *Id.* For more on the impact and use of drug dogs, see generally Harris, *Car Wars*, *supra* note 29, at 572.

52. *E.g.*, *United States v. Foley*, 206 F.3d 802, 805-06 (8th Cir. 2000); *Dortch*, 199 F.3d at 200; *United States v. Hill*, 198 F.3d 258, 272 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 1207 (2000).

53. 182 F.3d 643 (8th Cir. 1999).

54. *Id.* at 649.

55. *Id.*

56. *Id.*

57. *Id.*

safety that significant intrusions by police are seemingly justified.⁵⁸ Unfortunately, persons of color are most likely to be perceived as a threat to these interests.⁵⁹ If the officer feels this way about the model plaintiff, that person may be threatened with a gun,⁶⁰ handcuffed or confined,⁶¹ or frisked for weapons.⁶² The perception of a threat will also justify search of the vehicle.⁶³ But if the model plaintiff is cooperative and nonthreatening, then these sorts of intrusions are unwarranted;⁶⁴ the officer must have additional justification. Thus, a frisk or vehicle search requires reasonable, articulable suspicion of criminal activity.⁶⁵ Lengthy confinement—lying prone or remaining in handcuffs—usually requires probable cause for arrest.⁶⁶

There is one exception to the limitations on major intrusions during a traffic stop. Some courts have found that the officer can order the model plaintiff to sit in the officer's vehicle while a traffic citation is issued.⁶⁷ On an ordinary traffic stop, this order appears

58. *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998); *United States v. Shareef*, 100 F.3d 1491, 1502 (10th Cir. 1996); *Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996); *United States v. Del Vizo*, 918 F.2d 821, 825 (9th Cir. 1990); *United States v. Lego*, 855 F.2d 541, 545 (8th Cir. 1988).

59. *Lambert*, 98 F.3d at 1502 (two black men superficially resembled "armed and dangerous" suspects); *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1294 (9th Cir. 1988) (hispanic man living near stakeout site superficially resembled fugitive); *United States v. Ceballos*, 654 F.2d 177, 184 (2d Cir. 1981) (hispanic man fit "profile" of drug offender, and drug offenders were presumed dangerous).

60. *Shareef*, 100 F.3d at 1502; *Lego*, 855 F.2d at 545; *United States v. Serna-Baretto*, 842 F.2d at 965, 968 (7th Cir. 1988); *United States v. White*, 648 F.2d 29, 34-35 (D.C.Cir. 1981).

61. *Shareef*, 100 F.3d at 1502; *Del Vizo*, 918 F.2d at 824; *Lego*, 855 F.2d at 545.

62. *Knowles*, 525 U.S. at 118; *Lego*, 855 F.2d at 545.

63. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). In practice, this rule permits police to conduct a search at nearly any stop. 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 9.5(e) (3d ed. 1996).

64. *E.g.*, *Del Vizo*, 918 F.2d at 825 ("Indeed, the government cites no case in which we have found "reasonable measures" in a Terry-stop [of a cooperative motorist] to include drawing weapons on a cooperative suspect, ordering him out of his vehicle and to lie prone on the street, and handcuffing him.").

65. *E.g.*, *United States v. Bloomfield*, 40 F.3d 910, 918 (8th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). See also *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

66. *Washington v. Lambert*, 98 F.3d 1181, 1187 (9th Cir. 1996); *Bloomfield*, 40 F.3d at 917 ("[F]actors that may weigh in favor of an arrest are subjecting a suspect to unnecessary delays, handcuffing him, or confining him in a police car."); *Del Vizo*, 918 F.2d at 825-26.

67. *United States v. Wellman*, 185 F.3d 651, 656 (6th Cir. 1999); *Bloomfield*, 40 F.3d at 915; *cf.* *Pliska v. City of Stevens Point*, 823 F.2d 1168, 1176-77 (7th Cir. 1987) (finding that confinement of person in locked squad car was within the

to be an extraordinary intrusion upon the liberty of the motorist. Furthermore, it places the motorist in an intimidating situation. Removal to a squad car may be a pretext, without reasonable suspicion, for additional investigation. Courts, however, have permitted this practice, in an apparently uncritical award of police power.⁶⁸

The remaining limitation on the officer's execution of a traffic stop is the length of the stop. As previously noted, many courts stress brevity and lack of intrusiveness during traffic stops.⁶⁹ But there is no definite time limit for a traffic stop.⁷⁰ Once a warning or citation is issued, the officer cannot continue detaining a motorist, nor ask questions unrelated to the stop, without a reasonable, articulable suspicion of criminal activity.⁷¹ If the detention continues, it will eventually ripen into an arrest.⁷²

During a traffic stop, police have broad powers at their disposal. But the exercise of this power must be reasonable.⁷³ Reasonableness is not a static standard; it should respond to public expectations—not only in the law enforcement community, but also in the communities of color they serve. Through action for the model plaintiff, vigorous advocacy can reshape the reasonableness standard, limiting abuses of power by police and reflecting the will

permissible scope of an investigatory stop).

68. *United States v. Bradshaw*, 102 F.3d 204, 212 (6th Cir. 1996); *Bloomfield*, 40 F.3d at 915. For example, to support its analysis *Bloomfield* cites *United States v. Richards*, 967 F.2d 1189, 1193 (8th Cir. 1992). But, in *Richards* it is unclear whether the officer in fact asked the motorist to sit in the squad car. *Richards*, 967 F.2d at 1191, 1193.

69. *Supra* text accompanying note 42.

70. *United States v. Hill*, 195 F.3d 258, 270 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 1207 (2000) (citing *United States v. Place*, 462 U.S. 696, 709 (1983); *United States v. Sowers*, 136 F.3d 24, 28 (1st Cir. 1998); *Bloomfield*, 40 F.3d at 916-17; *see also* *United States v. Shareef*, 100 F.3d 1491, 1501-02 (10th Cir. 1996) (noting circumstances which legitimately delay completion of a traffic stop)).

71. *Dortch*, 199 F.3d at 198-99 (5th Cir. 1999); *Hill*, 198 F.3d at 272; *United States v. Salzano*, 158 F.3d 1107, 1111-12 (10th Cir. 1998); *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir. 1994), *cert. denied*, 511 U.S. 1095 (1994). Also, once the transaction is completed, an officer cannot hold the driver's license or documentation in order to extend the length of the traffic stop. *Dortch*, 199 F.3d at 198.

72. *E.g.*, *Shareef*, 100 F.3d at 1500; *Bloomfield*, 40 F.3d at 917. This assertion simplifies the factors in determining whether a stop has become an arrest. Usually, to determine whether an arrest has occurred, courts review a "laundry list" of factors. *Id.* *See also* *United States v. White*, 648 F.2d 29, 34 (D.C. Cir. 1981). For the model plaintiff, no probable cause for arrest is apparent. Thus, justification for arrest is negligible, and length of detention is the only probative factor to determine an arrest. *Id.*

73. *Supra* text accompanying notes 42-44.

of the community.

III. LITIGATION

For those who are subjected to racial profiling, the incident can cause fear, mistrust, and anger.⁷⁴ To vindicate their rights, they may seek recourse through the courts. However, a positive result is not always assured.⁷⁵ Even if a victim of racial profiling prevails, the result may not lead to a change in police behavior.⁷⁶ Nonetheless, litigation is an important tool for action, and it requires a close look. This section will focus on federal remedies for violations of civil rights.⁷⁷ For each remedy, both basic elements of the *prima facie* case, as well as strategic factors, will be considered. This information will clarify the possibilities, and the goals, of litigation.

A. *The Section 1983 Claim*

In cases of police misconduct, 42 U.S.C. section 1983 is the most common basis for action. The statute provides,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁷⁸

This provision has been construed as a "constitutional tort," provid-

74. Harris, *Driving While Black*, *supra* note 1, at 269-75; Sklansky, *supra* note 29, at 312-13; *see also* Newport, *supra* note 5 (finding that thirty-six percent of all blacks had an unfavorable opinion of local police).

75. Jennifer A. Larrabee, Note, "*DWB (Driving While Black)*" and *Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J. L. & POL'Y 291, 315 (1997) (proof of discriminatory intent "insurmountable"); Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 757 (1993) (police misconduct is a "very difficult" area of law, with few victories for plaintiffs).

76. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 14 (1983); Patton, *supra* note 75, at 768.

77. Administrative remedies, as well as rights of action reserved to the United States Attorney General, will not be discussed. *See generally* 42 U.S.C.A. § 3789d (1994); 42 U.S.C.A. § 1414 (1995).

78. 42 U.S.C.A. § 1983 (1994).

ing redress when a person's constitutional rights are violated.⁷⁹ Many of elements of a Section 1983 claim are shared by other civil rights claims.⁸⁰ Thus, Section 1983 is a good starting point for discussion.

A Section 1983 claim has two essential elements. First, the plaintiff must have been deprived of a constitutional right.⁸¹ Second, the deprivation must have been committed by a person acting under color of state law.⁸² However, a Section 1983 claim also requires the plaintiff to decide whom to sue, and what damages or other remedies are available.⁸³

Deprivation of a Constitutional Right. When a court analyzes a Section 1983 claim, it first decides what constitutional rights, if any, have been infringed.⁸⁴ On a vehicular stop, ordinary search and seizure issues are raised under the Fourth Amendment. However, allegations of racial profiling will raise the Equal Protection Clause of the Fourteenth Amendment.⁸⁵ Because of these different standards, an unlawful detention under the Fourth Amendment cannot, by itself, prove that racial profiling occurred.

A violation of the Fourth Amendment is determined by the "objective reasonableness" standard.⁸⁶ This standard was discussed earlier, while examining the extent of police power against the "model plaintiff."⁸⁷ As noted, the test asks (1) "whether the officer's action was justified at its inception," and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place."⁸⁸ Because the test is objective, reasonableness is determined "in light of the facts and circumstances confronting [police officers], without regard to their ... motiva-

79. *E.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986).

80. *Infra* Parts III.B., III.C.

81. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

82. *Id.*

83. *See generally* John Mahoney, *The Prima Facie Section 1983 Case*, in SECTION 1983: SWORD AND SHIELD 119, 120 (Robert H. Freilich & Richard G. Carlisle eds., 1983).

84. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see also Parratt*, 451 U.S. at 535-36.

85. *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

86. *Graham*, 490 U.S. at 388. *See supra* text accompanying notes 39-48.

87. *Supra* Part II.

88. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

tion.”⁸⁹ A Fourth Amendment violation must also be willful, in the sense that the officer’s action was an intentional use of police power rather than an accident.⁹⁰ However, it is important to note that the officer’s state of mind is not relevant to intent in this sense.⁹¹

On the other hand, the officer’s state of mind can be critical to a claim based on violation of the Equal Protection Clause. A violation occurs if “discriminatory purpose” is a motivating factor in the police officer’s enforcement of the law.⁹² Discriminatory purpose by police can be established in two ways: conduct may be discriminatory “on its face” or discriminatory “in its application.”⁹³

To be discriminatory on its face, discrimination must be expressed in the conduct itself.⁹⁴ In court, this is difficult to prove, since police officers will rarely admit to racism as the motivation for their conduct.⁹⁵ Furthermore, courts are reluctant to find discriminatory purpose, even where it would appear clear. For example, use of a racial epithet will not support a claim of discriminatory purpose.⁹⁶

To prove an action is discriminatory in its application, the plaintiff must provide facts that will create an inference of discriminatory purpose.⁹⁷ A “disparate impact” on members of a racial minority cannot prove discriminatory purpose, but may help show that purpose.⁹⁸ Other factors include historical background leading to the challenged conduct, the immediate sequence of events leading to the conduct, and any departures from established pro-

89. *Graham*, 490 U.S. at 397.

90. *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989).

91. *Id.* at 596, 598.

92. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). *Village of Arlington Heights* subsequently guided analysis of Equal Protection Clause issues. *E.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997).

93. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.4 (3d ed. 1999).

94. *Id.*

95. Randall S. Suskind, *Race, Reasonable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 341 (1994).

96. *Hopson v. Fredricksen*, 961 F.2d 1374, 1378 (8th Cir. 1992) (finding no discriminatory intent where officer “uttered a racial slur” and threatened to knock plaintiff’s teeth out); *Wade v. Fisk*, 575 N.Y.S.2d 394, 396 (N.Y. 1991) (holding that racial epithet cannot form the basis for a Section 1983 claim). Courts have not considered the consequence of this rule; in effect, a direct verbal expression of racial hatred somehow does not indicate “discriminatory purpose.” *Id.*

97. *Village of Arlington Heights*, 429 U.S. at 265.

98. *Id.* at 264-65.

cedure for the conduct.⁹⁹

Many of these factors can be difficult to establish, particularly because police procedures will not show any discriminatory purpose. Absent other proof of discriminatory purpose, a neutral procedure does not violate the Equal Protection Clause, even if it results in a "disproportionately adverse" affect on a minority.¹⁰⁰ But if a neutral procedure leads to a "clear pattern" of discrimination that is "unexplainable on grounds other than race," discriminatory intent is found.¹⁰¹

One way of showing a "clear pattern" of discrimination is through the use of statistics.¹⁰² However, courts may misinterpret or mistrust statistical evidence.¹⁰³ Statistics may be poorly executed or even anecdotal.¹⁰⁴ In *McCleskey v. Kemp*,¹⁰⁵ the Supreme Court was given a rigorous statistical model.¹⁰⁶ The Court refused to accept the result of the model, preferring "exceptionally clear proof."¹⁰⁷ The Court also expressed discomfort at the idea that statistics might explain the consequences of public policy.¹⁰⁸ Nevertheless, statistical evidence may be useful, particularly in class action suits.¹⁰⁹ Furthermore, proposed legislation on racial profiling

99. *Id.* at 267.

100. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-89 (1997).

101. *Vill. of Arlington Heights*, 429 U.S. at 266.

102. *McCleskey v. Kemp*, 481 U.S. 279, 293 & n. 11 (1987); *Rizzo v. Goode*, 423 U.S. 362, 375 (1976); *Thomas v. County of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1993).

103. Douglas L. Williams, *Statistical Evidence in Discrimination Cases*, C874 ALI-ABA 801, 807-08 (1993); *see also* Kingsley R. Browne, *The Strangely Persistent "Transposition Fallacy": Why "Statistically Significant" Evidence of Discrimination May Not Be Significant*, 14 LAB. LAW. 437, 438 (1998) (discussing use of statistics in employment discrimination cases).

104. *United States v. Armstrong*, 517 U.S. 456, 460-61, 470 (1996); Williams, *supra* note 103, at 807-08. In *Armstrong*, the claimants' statistical "study" was based on the anecdotal experience of defense attorneys and a newspaper article. *Armstrong*, 517 U.S. at 460-61.

105. 481 U.S. 279 (1987).

106. *Id.* at 289 n.6.

107. *Id.* at 297. For examples of "exceptionally clear proof," the Court provided cases where (1) a state legislature altered the boundary of a city from a square to an "uncouth twenty-eight-sided figure," and (2) out of 310 laundry owners who required licenses to continue operation, all of the Chinese-American owners—200 of the 310—were denied licenses. *Id.* at 293 n.12. *Cf. ROTUNDA & NOWAK, supra* note 93, § 18.4 (noting that the Court finds statistical proof "usually relevant but rarely determinable").

108. *McCleskey v. Kemp*, 481 U.S. 279, 294-95 & n.15 (1987).

109. *E.g., Thomas v. County of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1993).

often includes government compilation of race data on vehicular stops.¹¹⁰ This data, collected under the auspices of government, would likely be more persuasive to the courts.

In review, between the Fourth Amendment and the Equal Protection Clause, the standards for constitutional deprivation vary widely, presenting different burdens of proof. A claim under the Fourth Amendment may redress an officer's objectively wrongful conduct on the stop, but cannot address any race-based motivation for the action. By raising the Equal Protection Clause of the Fourteenth Amendment, the plaintiff directly challenges racial discrimination, but is also faced with a difficult burden of proof.¹¹¹ Unless discriminatory purpose is clearly obvious from a single incident, victims of racial profiling are best served by class action. This way, plaintiffs can combine resources and investigate the facts more thoroughly. Each plaintiff gains credibility when it is clear that their experiences are not isolated, but part of a broader pattern. Last of all, the class action forms a basis for community action, creating a network of people with similar concerns acting together.

Whom to Sue and Why. Next, the plaintiff must select the defendants. Section 1983 requires the defendant to act "under color of state law."¹¹² Whenever an officer's action relies upon authority granted by the state, that action is under color of state law.¹¹³ A vehicular stop is a clear use of police authority. Thus, on most stops, officers are amenable to suit under Section 1983.

However, there are some constitutional limitations on whether an officer can be sued. For example, federal officers do not act under color of state law, and thus cannot be sued under Section 1983.¹¹⁴ State officers, such as state highway patrol, cannot be sued

It is not certain whether class action suits are permitted under Section 1983. *E.g.*, *Rizzo v. Goode*, 423 U.S. 362, 365 n.1, 373 n.7 (1976) (declining to rule on whether Section 1983 permitted class action); *Thomas*, 978 F.2d at 507 (accepting class action). See also 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 4:16 (4th ed. 1996) (questioning whether damages can be apportioned for a class action). See generally FED. R. CIV. P. 23.

110. *Infra* Part IV.

111. *Larrabee*, *supra* note 75, at 315 (finding proof of discriminatory purpose nearly "insurmountable").

112. 42 U.S.C.A. § 1983 (1994).

113. *Screws v. United States*, 325 U.S. 91, 107-108 (1945); *Rogers v. City of Little Rock*, 152 F.3d 790, 798 (8th Cir. 1998); *Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975).

114. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 398 n. 1 (1971) (Harlan, J., concurring).

in their official capacity.¹¹⁵ However, state officers can be sued in their individual capacity.¹¹⁶ In all other cases, including municipal and county police, officers are amenable to suit.¹¹⁷

Other limitations arise when a supervisory entity—such as a municipality, county, or state—is sued. Because of the Eleventh Amendment, states are immune from suit under section 1983.¹¹⁸ A municipality or county can be sued directly, but liability does not arise simply because it employed an officer that violated the Constitution.¹¹⁹ Stated another way, a municipality is not vicariously liable for the constitutional torts of its employees.¹²⁰ Rather, to impose liability, the municipality must have a separate “policy or custom” which led to the deprivation of constitutional rights.¹²¹ In terms of police conduct, relevant policies or customs include hiring practices, training practices, and supervision.

If a municipality “directly authorizes” a violation of constitutionally protected rights, then liability can be directly imposed.¹²² But where hiring, training, or supervision policies indirectly lead to constitutional violations, a causal link between the policy and the violation is difficult to establish.¹²³ Therefore, liability is not imposed unless policymakers show “conscious disregard” or “deliberate indifference” to the consequences of their decisions.¹²⁴ This standard is very narrow: even gross negligence will not permit liabil-

115. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989). Even though action against federal and state officers is limited under Section 1983, relief for constitutional deprivation is available by other means. *Infra* text accompanying notes 163-74.

116. *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991); *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985). For an examination of possible claims against state police officers and states, as well as the distinction between official and individual capacity, see *supra* text accompanying notes 163-74.

117. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 662 (1978); see also *id.* at 705 (Powell, J., concurring).

118. *Will*, 491 U.S. at 66. The Eleventh Amendment provides, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .” U.S. CONST. amend. XI.

119. *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 406-07 (1997); *Monell*, 436 U.S. at 690-91.

120. *Monell*, 436 U.S. at 691.

121. *Id.* at 694.

122. *Brown*, 520 U.S. at 406.

123. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

124. *Id.* at 389; see also *Andrews v. Fowler*, 98 F.3d 1069, 1074-75 (8th Cir. 1996) (finding liability where a pattern of misconduct was “persistent and widespread” and policymakers “deliberately failed” to take action).

ity.¹²⁵ Instead, this standard requires that policymakers have notice of constitutional violations but then fail to act.¹²⁶ Unless an action is expressly authorized, a single incident is insufficient to prove a municipality's deliberate disregard for others' rights.¹²⁷

Once again, problems of proof confront the plaintiff. Because a single incident is insufficient to show deliberate disregard, an individual plaintiff cannot rely on just his or her own experience as grounds to sue a municipality.¹²⁸ But, even if the municipality is not a party, it will usually compensate for the liability of its employees in their official capacity.¹²⁹ The advantage of having a municipality as a party, aside from the possibility of damages, is that it may permit equitable relief against the municipality.¹³⁰ Thus, the action is more likely to change community policing policies.¹³¹ Furthermore, if a municipal custom is found unconstitutional in one case, then collateral estoppel may operate in subsequent cases against the municipality, giving other plaintiffs affected by the custom the chance to step forward.¹³²

Qualified Immunity. For persons subject to liability under Section 1983, qualified immunity can provide an affirmative defense.¹³³ The defendant must plead qualified immunity and carry its burden of proof.¹³⁴ In the leading case on qualified immunity, *Harlow v. Fitzgerald*,¹³⁵ the Supreme Court promulgated an objective test that holds officials immune "insofar as their conduct does not violate

125. *Brown*, 520 U.S. at 407.

126. *Id.* ("If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for."); *Andrews*, 98 F.3d at 1075, 1078.

127. *Harris*, 489 U.S. at 390-91; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985).

128. As previously noted, fundamental problems of proof argue for class action in Section 1983 claims. *Supra* text accompanying note 111.

129. *E.g.*, *Monell*, 436 U.S. at 699 (quoting S. Rep. No. 94-1011, at 5, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913) (noting that if a judgment is assessed against an actor in his or her official capacity, fees and costs are assessed to the municipality); Patton, *supra* note 75, at 759 (noting that California law requires municipalities to pay for judgments against their police officers).

130. *Infra* text accompanying notes 157-62.

131. SCHUCK, *supra* note 76, at 14, 79.

132. MICHAEL AVERY & DAVID RUDOVSKY, *POLICE MISCONDUCT: LAW AND LITIGATION* § 14.2(g) (2d ed. 1992).

133. 1 NAHMOD, *supra* note 109, at § 8.1. The immunity extends to police officers, school board members, mental hospital administrators, and prison officials. *Id.*

134. *Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980).

135. 457 U.S. 800 (1982).

clearly established statutory or constitutional rights of which a reasonable person would have known."¹³⁶

Since the adoption of this test, the extent of the immunity has broadened. The "clearly established rights" of the test—rather than referring to broad principles of law—refer to more "particularized" violations of constitutional rights.¹³⁷ And those rights are defined by what a "reasonable official would understand."¹³⁸ By this reasoning, an officer's mistake allows violation of another's constitutional rights, if a reasonable officer could make the same mistake under the circumstances.¹³⁹

As a practical matter, qualified immunity will be raised in any Section 1983 litigation with police. Since it is often a matter for summary judgment,¹⁴⁰ plaintiffs will want to make thorough fact investigation prior to trial, and to take advantage of any discovery permitted prior to the motion.

Municipalities and counties do not receive any immunities, qualified or sovereign, under Section 1983.¹⁴¹

*Damages and Injunction.*¹⁴² Actual damages are not essential for

136. *Id.* at 818. By adopting this rule, the Court abolished a subjective component that had been part of the qualified immunity standard. 1 NAHMOD, *supra* note 109, at § 8.5; see also *Harlow*, 457 U.S. at 814. In doing so, the Court noted, "[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial" *Harlow*, 457 U.S. at 817-18. However, the new rule has, in effect, significantly increased the burdens of those seeking relief under Section 1983. See generally 1 NAHMOD, *supra* note 109, at § 8.5.

137. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

138. *Id.* at 640.

139. *Id.* at 641. The "exigent circumstances" doctrine, significantly expands qualified immunity. *Id.* at 657-58 (Stevens, J., dissenting). The doctrine permits any officer to claim that their constitutional violation is a "mistake" that a "reasonable officer" could have made. *Id.* Since subjective motivation is no longer a component of qualified immunity, the doctrine in effect creates a presumption of good faith when a "mistake" occurs. *Id.*

Justice Stevens also finds that the exigent circumstances doctrine creates a constitutional double standard. at 663-66. For example, under the Fourth Amendment, an officer's search must be reasonable. But even if an unreasonable search is mistakenly executed, a second standard—that of the mistaken "reasonable" police officer—may then exempt the officer from liability. Thus, the rule allows a certain number of unreasonable police searches as a matter of routine police practice. The exigent circumstances doctrine may allow erosion of other constitutional rights. A more critical treatment of the doctrine is beyond the scope of this paper, but the doctrine should be subject to scrutiny.

140. 1 NAHMOD, *supra* note 109, at § 8:23. See also *Harlow*, 457 U.S. at 818 (summary judgment avoids "excessive disruption of government").

141. *Owen v. City of Indep.*, 445 U.S. 622, 657 (1980).

142. Although not covered in detail here, attorneys' fees are available for a

a Section 1983 claim.¹⁴³ But if damages are sought, the principles of common law torts apply.¹⁴⁴ Thus, grounds for compensatory damages may include physical injuries,¹⁴⁵ mental or emotional distress,¹⁴⁶ and other out-of-pocket expenses.¹⁴⁷ Punitive damages are also available from individual actors¹⁴⁸ but not from municipalities.¹⁴⁹ The defendant can incur punitive damages for either "reckless or callous disregard for the plaintiff's rights" or "intentional violations of federal law."¹⁵⁰ Yet, courts place no "abstract value" on a violation of civil rights.¹⁵¹ Even if a violation is proven, damages are not presumed.¹⁵² Nor does a special category of damages flow from a civil rights violation.¹⁵³

For a racial profiling claim, the closest analogy in common law tort is false imprisonment. A vehicular stop, especially if brief, may not appear to provide many grounds for damages.¹⁵⁴ However, significant emotional distress may occur during false imprisonment, including feelings of degradation and inferiority, humiliation, fright, and embarrassment.¹⁵⁵ Even without racially discriminatory purpose, if the plaintiff feels that racial profiling had occurred, then these feelings may be heightened—and thus important when proving damages. In addition, under federal tort common law, recovery for emotional distress does not require proof of physical symptoms.¹⁵⁶ Punitive damages should also be pursued. For exam-

successful action under Section 1983. 42 U.S.C.A. § 1988 (1994).

143. *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

144. *Id.* at 257-58.

145. *E.g.*, *Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990).

146. *E.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Carey*, 435 U.S. at 263-64.

147. *E.g.*, *Stachura*, 477 U.S. at 307; *Wright*, 919 F.2d at 669; *Smith v. Heath*, 691 F.2d 220, 226 (6th Cir. 1982).

148. *Smith v. Wade*, 461 U.S. 30, 35 (1983).

149. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

150. *Smith v. Wade*, 461 U.S. at 51.

151. *Stachura*, 477 U.S. at 308.

152. *Carey v. Piphus*, 435 U.S. 247, 262-63 (1978).

153. *Stachura*, 477 U.S. at 308.

154. *See generally* *Fassett v. Haeckel*, 936 F.2d 118, 121 (2d Cir. 1991) (awarding no damages to claimant for unlawful vehicular stop); *Dellums v. Powell*, 566 F.2d 147, 174 n.6 (D.C. Cir. 1977) (in class action, awarding damages on a sliding scale; claimants detained up to twelve hours received one hundred and twenty dollars); *Davet v. Maccarone*, 775 F. Supp. 492, 494-95 (D.R.I. 1991), *aff'd* 973 F.2d 22 (1st Cir. 1992) (awarding no damages to claimant for unlawful overnight detention in jail).

155. *Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990).

156. *E.g.*, *Davet*, 775 F. Supp. at 493-94. State common law standards for emotional distress recovery are inapplicable. *Id.* at 494 n.1.

ple, if discriminatory purpose is proven, "callous disregard" for the plaintiff's rights should follow from the facts.

In addition to money damages, Section 1983 can provide grounds for an injunction.¹⁵⁷ For an injunction to be issued, plaintiff must show a "real and immediate threat" of the "likelihood of substantial and immediate irreparable injury."¹⁵⁸ In terms of police conduct, plaintiffs may be required to show a greater likelihood of injury from police than other citizens would receive,¹⁵⁹ or that this likelihood is greater than in comparable metropolitan areas.¹⁶⁰ A persistent or pervasive pattern of conduct, particularly with multiple incidents against a single claimant, is more persuasive.¹⁶¹ Police misconduct can also be more clearly illustrated by tracking actions in a small geographic area.¹⁶² In any case, injunctive relief requires a detailed fact record.

State and Federal Actors. Section 1983 provides redress for constitutional violations of municipalities and counties. But federal entities, as well as states and their police agencies, are not subject to action under Section 1983.¹⁶³ This does not leave the victim of state and federal abuses without relief, however. Other actions, similar in most respects to Section 1983, are available.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court allowed action against federal agents

157. *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976).

158. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); see also *Rizzo*, 423 U.S. at 372-73; *Thomas v. County of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1993).

159. *Lyons*, 461 U.S. at 111 ("Absent a sufficient likelihood that he will again be wronged in a similar way, [plaintiff] is no more entitled to an injunction than any other citizen of Los Angeles.").

160. *Rizzo*, 423 U.S. at 375. In *Rizzo*, the court refused an injunction, in part because police misconduct did not differ from that found elsewhere. *Id.* "[T]he problems disclosed by the record are fairly typical of those afflicting police departments in major urban areas." *Id.* (quoting Council of Orgs. on Philadelphia Police Accountability and Responsibility v. *Rizzo*, 357 F. Supp. 1289, 1318 (E.D.Pa. 1973), *rev'd sub nom.* *Rizzo v. Goode*, 423 U.S. 362 (1976)) (alterations omitted). This logic raises some problems. Injunctive relief could be denied on the ground that many police departments face allegations of racial profiling. In effect, if a pattern of police misconduct is pervasive enough, then an injunction will not issue.

161. *Rizzo*, 423 U.S. at 374-75; *Thomas*, 978 F.2d at 508.

162. *Thomas*, 978 F.2d at 507 (examining record of police misconduct in six by seven block area).

163. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (finding no Section 1983 liability for states or their agencies); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 399 n. 1 (1971) (Harlan, J., concurring) (noting no federal liability under Section 1983).

for violation of the Fourth Amendment.¹⁶⁴ The Court subsequently recognized causes for relief arising directly from other provisions of the Constitution.¹⁶⁵ These suits, seeking relief for constitutional violations of federal officials, are now generally known as "Bivens actions."¹⁶⁶ In practice, Bivens actions are analogous to Section 1983 actions, with the same prima facie elements, defenses, and damages.¹⁶⁷

Liability for the constitutional violations of state officials was first recognized in *Ex parte Young*.¹⁶⁸ In this case, the Supreme Court held that state officials are liable in equity for violations of the federal Constitution.¹⁶⁹ An injunction may issue, but the Eleventh Amendment bars recovery of money damages from the state.¹⁷⁰ Thus, *Young* will allow action against state police,¹⁷¹ but prospects for relief under the theory are limited.¹⁷²

Money damages are not foreclosed, however. Not only are state police suable in their official capacity under *Young*, but also in their individual capacity under Section 1983.¹⁷³ In an individual capacity action, if liability is found, then it is imposed solely upon the individual officer and collected from that person's assets.¹⁷⁴

164. *Bivens*, 403 U.S. at 397.

165. *E.g.*, *Davis v. Passman*, 442 U.S. 228, 242-44 (1979) (permitting cause of action under the Equal Protection Clause of the Fifth Amendment).

166. *E.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 805 (1982); *Dellums v. Powell*, 566 F.2d 147, 175 (D.C. Cir. 1977).

167. *E.g.*, *Harlow*, 457 U.S. at 818 n.30 (finding no distinction between Bivens actions and Section 1983 for immunity purposes); *Dellums*, 566 F.2d at 283-84 (adopting prima facie elements of Section 1983 for *Bivens* actions).

168. 209 U.S. 123 (1908).

169. *Id.* at 155-56.

170. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984); *Hutto v. Finney*, 437 U.S. 678, 690 (1978). However, if the action is successful, attorneys' fees can be recovered, even though the fees are paid by the state. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Hutto*, 437 U.S. at 692.

171. *Andrus v. Arkansas*, 197 F.3d 953, 955 (8th Cir. 1999); *Akella v. Michigan Dep't of State Police*, 67 F. Supp. 2d 716, 722 (E.D.Mich. 1999); *Reyes v. Supervisor of Drug Enforcement Admin.*, 647 F. Supp. 1509, 1512 (D.P.R. 1986), *vacated on other grounds*, 834 F.2d 1093 (1st Cir. 1987).

172. The scope of injunctive relief under *Young* has not been defined. In dicta, the Supreme Court has suggested that state "policy or custom" is the basis for relief. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). This standard would be analogous to that for municipal liability. See *supra* text accompanying notes 122-27. For comparison, consider the availability of injunction for Section 1983 actions. See *supra* text accompanying notes 157-62.

173. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Graham*, 473 U.S. at 166.

174. *Graham*, 473 U.S. at 166. Individual liability has harsher consequences on state police than on municipal and county police. Municipal and county officers

B. *The Section 1985(3) Claim*

Similar to Section 1983, 42 U.S.C. section 1985 imposes liability for deprivation of constitutional rights. But Section 1985 is a conspiracy provision, operating against the actions of two or more persons, regardless of whether those persons act under color of state law. Paragraph three of the section provides:

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory the equal protection of the laws; . . . the party so injured or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators.¹⁷⁵

The provision is used most frequently against public officials.¹⁷⁶ It provides an important expansion of options for civil rights litigation.

The *prima facie* Section 1985(3) case has four elements. The claimant must show (1) a conspiracy (2) whose purpose is to deprive any person or class of equal protection of laws, or of equal privileges and immunities under the law; and that (3) an action in furtherance of the conspiracy (4) injured the claimant, damaged the claimant's property, or deprived the claimant of his or her rights.¹⁷⁷

Conspiracy. For the first element, courts have not promulgated a consistent definition for conspiracy.¹⁷⁸ But, a partial definition may be clearly inferred from Section 1985(3) cases. At minimum, a conspiracy involves two or more persons, with a plan to cause injury

are generally compensated for liability acquired in the line of duty. *E.g.*, Patton, *supra* note 75, at 759.

175. 42 U.S.C.A. § 1985 (1994).

176. Michael Finch, *Governmental Conspiracies to Violate Civil Rights: A Theory Reconsidered*, 57 MONT. L. REV. 1, 3-4 (1996).

177. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971); *see also* Larson v. Miller, 76 F.3d 1446, 1454 (8th Cir. 1996); Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994); Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2nd Cir. 1993); Lenard v. Argento, 699 F.2d 874, 883 (7th Cir. 1983). The "four" elements result from a somewhat clumsy reformulation of Section 1985's language in *Griffin*.

178. *Cf.* Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988) ("[A]ttempts at definition [of conspiracy] will not help.").

to others.¹⁷⁹ Not all members of the conspiracy need to know the details of the plan, so long as all members share a common objective.¹⁸⁰

Purpose to Deprive Others of Recognized Rights. The second element limits Section 1985(3) to conspiracies whose purpose is to deprive others of equal protection, or privileges and immunities, under the law.¹⁸¹ For this element, "purpose" has been narrowly read to require "racial ... invidiously discriminatory animus."¹⁸² The conspiracy does not have to intend to harm the claimant specifically,¹⁸³ but only to harbor "ill will" toward members of the plaintiff's race.¹⁸⁴

Then, this purpose must be directed toward deprivation of a recognized right.¹⁸⁵ In particular, the asserted right must be enforceable against a private actor,¹⁸⁶ even if the conspirators are public officials. Therefore, constitutional rights against state action, which may create liability under Section 1983, do not necessarily create liability under Section 1985(3).¹⁸⁷ The principal right recognized under Section 1985(3) is the right to interstate travel, implied from the Thirteenth Amendment.¹⁸⁸

Other rights are less settled. For example, Section 1985(3) provides liability when a private entity denies equal protection under the law.¹⁸⁹ But this right does not implicate the Equal Protection Clause of the Fourteenth Amendment, even though the language is similar.¹⁹⁰ Similarly, the provisions in the Bill of Rights are

179. *Collyer v. Darling*, 98 F.3d 211, 229 (6th Cir. 1996), *cert. denied*, 520 U.S. 1267 (1997); *Larson*, 76 F.3d at 1454; *Edmonds v. Dillin*, 485 F. Supp. 722, 729 (N.D. Ohio 1980) (defining conspiracy for claims against a municipality and its police officers).

180. *Collyer*, 98 F.3d at 229; *Jones*, 856 F.2d at 992.

181. *Griffin*, 403 U.S. at 102-03.

182. *Id.* at 102; *see also Larson*, 76 F.3d at 1454; *Mian*, 7 F.3d at 1087-88; *Tilton*, 6 F.3d at 686. *See generally* 3 JOSEPH G. COOK & JOHN L. SOBIESKI, CIVIL RIGHTS ACTIONS ¶ 13.09[A] (2000).

183. *Azar v. Conley*, 456 F.2d 1382, 1386 (6th Cir. 1972).

184. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993).

185. *Id.*

186. *Id.* at 278.

187. *Id.*; *see also Tilton*, 6 F.3d at 686-87.

188. *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

189. *E.g., Elmwood Props. v. Conzelman*, 418 F.2d 1025, 1028 (7th Cir. 1969).

190. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272 n.4 (1993) (comparing discriminatory purpose under Section 1985(3) and under the Equal Protection Clause of the Fourteenth Amendment). The Court observed, "We think [the discriminatory purpose] principle applicable to § 1985(3) not because we believe that Equal Protection Clause jurisprudence is automatically incorpo-

generally inapplicable.¹⁹¹

However, if the actors in a conspiracy are police, then further rights may be implicated. For example, in *United Brotherhood of Carpenters, Local 610 v. Scott*,¹⁹² the Supreme Court acknowledged that the First Amendment may apply if "it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state."¹⁹³ If this principle holds, then constitutional protections against state action could be applied against police; as actors with color of state law, police would implicate the authority of the state to further the conspiracy. Still, the application of Section 1985 to police misconduct requires further development.¹⁹⁴

Action by the Conspiracy. The third element is an action, by a conspiracy member, furthering its purpose.¹⁹⁵ The actor does not need to know the full scope of the conspiracy, so long as that person shares the conspiracy's purpose.¹⁹⁶

rated into § 1985(3), but rather because it is inherent in the requirement of a class-based animus" *Id.* Although this observation is in dicta, it points out a possible strategic advantage in actions under Section 1985(3) rather than Section 1983. According to the Court, "invidiously discriminatory animus" is "inherent" in discriminatory purpose under the Fourteenth Amendment. *Id.* This comparison allows the inference that racial animus under Section 1985(3) is a lower standard. *Cf. supra* text accompanying notes 97-101 (outlining the discriminatory purpose test for violation of the Equal Protection Clause of the Fourteenth Amendment). *See also* *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 832 (1983) (noting that Section 1985(3) does not expressly refer to the Fourteenth Amendment).

191. *E.g., United Bhd. of Carpenters, Local 610*, 463 U.S. at 831, 833-34.

192. 463 U.S. 825 (1983).

193. *Id.* at 830.

194. *See generally* *Lenard v. Argento*, 699 F.2d 874, 883 (7th Cir. 1983) (affirming lower court's determination; police use of racial epithets and alleged beating did not prove conspiracy to deny equal protection of law); *Edmonds v. Dillin*, 485 F. Supp. 722, 729 (N.D. Ohio 1980)

[I]f through its mayor or other executive leadership ... a municipal corporation should combine or agree with one or more police officers, acting individually and independently of the city, to specifically deprive an individual of his Fourth Amendment rights against unreasonable searches and seizures, and in furtherance of that combination or agreement one of the conspiring police officers acts with a specific intent to deprive said individual of such rights, a Section 1985 conspiracy claim would be stated against the municipal corporation and its police officers.

Id.

195. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *see also* *Lenard*, 699 F.2d at 883 (finding that conspiracy requires an "overt act").

196. *E.g., Collyer v. Darling*, 98 F.3d 221, 229 (6th Cir. 1996), *cert. denied*, 520 U.S. 1267 (1997); *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988).

Even though a plaintiff has suffered from a conspiracy's actions, that person may not be aware of a conspiracy. Proof of a conspiracy often relies on inferences surrounding the facts.¹⁹⁷ For example, in the case of racial profiling, the conspiracy arises before or after the encounter with the plaintiff. The officers agree, either explicitly or implicitly, to misreport or omit facts that prove misconduct—the arrangement better known as the “code of silence.”¹⁹⁸ It allows police to act without fear of reprisal, on the understanding that their colleagues or supervisors will not report their misconduct.¹⁹⁹ Thus, if investigation reveals that more than one officer knew of police misconduct, but police records fail to reflect this knowledge, then a Section 1985(3) action should be considered.²⁰⁰

*Damages.*²⁰¹ For the last element, the plaintiff must show that the conspirator's action injured the plaintiff, damaged the plaintiff's property, or deprived the plaintiff of a recognized right.²⁰² More plainly put, the plaintiff must show damages.

The case law for Section 1985(3) does not offer an in-depth analysis for available remedies. However, a comparison of Section 1983 and Section 1985(3) is instructive. Both provisions were passed as part of the Civil Rights Act of 1871.²⁰³ Thus, as for Section

197. *E.g.*, *Burrell v. Bd. of Trs. of Ga. Military Coll.*, 970 F.2d 785, 789 (11th Cir. 1992) (finding that prima facie case for Section 1985(3) conspiracy may rely on circumstantial evidence); *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979) (noting that proof of conspiracy “must often be met by circumstantial evidence; conspirators rarely formulate their plans in ways susceptible of proof by direct evidence”).

198. *See generally* Stanley Z. Fisher, “*Just the Facts, Ma’am*”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993).

199. *Id.* at 12, 14; Patton, *supra* note 75, at 763; *see also* NEAL E. TRAUTMAN, NATIONAL INSTITUTE ON ETHICS, CODE OF SILENCE RESEARCH 12 (2000) (on file with author). Trautman conducted a nationwide survey on the “code of silence.” *Id.* Of the 1,157 police officers who responded, forty-six percent admitted to witnessing and not reporting their colleagues' misconduct. *Id.*

200. *E.g.*, *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973) (showing police fabricated grounds for arrest, filed false reports, and gave false testimony); *Mody v. City of Hoboken*, 758 F. Supp. 1027, 1029, 1033 (D.N.J. 1991) (showing police failed to report or respond to racially motivated violence).

The doctrine of qualified immunity may apply to Section 1985(3) actions in some cases. Currently, the federal circuit courts are split on the applicability of the doctrine. *Compare* *Bisbee v. Bey*, 39 F.3d 1096, 1101 (10th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995) with *Burrell*, 970 F.2d at 794. For an examination of the doctrine, see *supra* text accompanying notes 133-141.

201. Although not covered in detail here, attorneys' fees are available for a successful action under Section 1985. 42 U.S.C.A. § 1988 (1994).

202. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).

203. *Finch*, *supra* note 176, at 2.

1983, the remedies for Section 1985(3) are developed out of common law tort principles.²⁰⁴ It is unclear whether this relationship permits Section 1983's remedies to be imported, without further consideration, into Section 1985(3).²⁰⁵

Under Section 1985(3), the ordinary basis for relief is compensatory damages, which may include physical injury and mental distress.²⁰⁶ Punitive damages are also available.²⁰⁷ In addition, since the conspiracy's purpose is the willful deprivation of others' rights, punitive damages should follow any successful Section 1985(3) claim.²⁰⁸ Courts have also provided injunctive relief.²⁰⁹

When evaluating possible damages, it should be emphasized that Section 1985(3) acts against public officials in their individual capacity.²¹⁰ Thus, if the action is successful, the judgment is collected against the official's personal assets.²¹¹ A government entity cannot be held vicariously liable, nor is it required to indemnify the official's liability.²¹²

Section 1986 Actions. Once a Section 1985 conspiracy is proven, liability is limited to private entities.²¹³ However, under 42 U.S.C.

204. *Id.* at 18-19.

205. Compare 42 U.S.C. § 1983 (2000) (violator "shall be liable ... in an action at law, suit in equity, or other proceeding for redress) with 42 U.S.C. § 1985(3) (2000) (violator "may have an action for the recovery of damages"). Note that Section 1985(3) does not expressly permit equitable remedies. *But see* *Action v. Gannon*, 450 F.2d 1227, 1237-38 (8th Cir. 1971) (finding availability of equitable relief under Section 1985(3) implied from its availability under 42 U.S.C. § 1981).

206. *Lenard v. Argento*, 699 F.2d 874, 892 (7th Cir. 1983). Deprivation of rights does not create a special category of damages, such as "special damages" or "substantial damages," and proof of injury is required. *Id.* Cf. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (disallowing special damages under Section 1983).

207. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1267 (7th Cir. 1984); *Crowe v. Lucas*, 595 F.2d 985, 992 (5th Cir. 1979).

208. *Finch*, *supra* note 176, at 12-13 (commenting that Section 1985(3) conspiracy "implies a higher degree of culpability" which warrants imposition of punitive damages).

209. *E.g.*, *Action*, 450 F.2d at 1227; *Santiago v. City of Philadelphia*, 435 F. Supp. 136, 155 n. 7 (E.D.Pa. 1977).

210. *Finch*, *supra* note 176, at 36 & n. 204. See also *supra* text accompanying notes 173-74 (briefly discussing the difference between "official capacity" and "individual capacity" lawsuits against public officials).

211. *Bell*, 746 F.2d at 1269.

212. *Id.*; see also *Proffitt v. United States*, 758 F. Supp. 342, 345 (E.D.Va. 1990) (rejecting Section 1985(3) liability against federal official in official-capacity lawsuit, but permitting subsequent individual-capacity lawsuit without prejudice).

213. *Bell*, 746 F.2d at 1269.

section 1986,²¹⁴ other parties may be held liable for failure to act against the conspiracy.²¹⁵ As a result, liability can be extended to persons acting in their official capacity.²¹⁶

For a Section 1986 claim, the plaintiff must show that (1) the defendants had actual knowledge of a Section 1985 conspiracy; (2) the defendants had power to prevent, or to aid in preventing, a violation of Section 1985 by the conspiracy; (3) the defendants neglected or refused to prevent the violation; and (4) a wrongful act was committed by the conspiracy.²¹⁷ Proof of a violation under Section 1985 is essential to the success of a Section 1986 claim. Even if action is not brought under Section 1985, the elements of a Section 1985 claim must be satisfied.²¹⁸

Once a conspiracy is proven, the principal issue usually is whether the defendants had actual knowledge of that conspiracy.²¹⁹ Because proof of a conspiracy often relies upon circumstantial evidence, it can be difficult to impute actual knowledge of the conspiracy to the defendants.²²⁰ Therefore, the defendants' actions will best indicate whether they had knowledge of the conspiracy.²²¹ If the conspiracy is within a police department, actual knowledge may be proven by supervisors' attempts to remedy conspiratorial mis-

214. 42 U.S.C.A. § 1986 (1994).

215. *Id.* The statute provides,

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in [42 U.S.C. § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured ... for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented and any number of persons guilty of such wrongful neglect may be joined as defendants in the action But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Id.

216. *E.g.*, *Park v. City of Atlanta*, 120 F.3d 1157, 1161 (11th Cir. 1997) (action against members of city government and police department); *Clark v. Clabaugh*, 20 F.3d 1290, 1294, 1298 (3d Cir. 1994) (action against members of city government and police department); *Hampton v. City of Chicago*, 484 F.2d 602, 610 (7th Cir. 1973) (action against mayor and other city officials).

217. *Clark*, 20 F.3d at 1295.

218. *Park*, 120 F.3d at 1159-60.

219. *Id.* at 1160; *Clark*, 20 F.3d at 1296; *Hampton*, 484 F.2d at 610.

220. *E.g.*, *Clark*, 20 F.3d at 1296. See *supra* note 197 and accompanying text.

221. *E.g.*, *Park*, 120 F.3d at 1162 (suggesting analysis of police radio transmissions during the alleged conspiracy's actions); *Clark*, 20 F.3d at 1297 (noting police's responses to "rumors" of conspiracy).

conduct.²²² Another possible source could be citizen complaints about the misconduct.

After actual knowledge is established, the remaining issue is whether the defendants neglected or refused to prevent the Section 1985 violation.²²³ The defendant's inaction does not have to be purposeful. Rather, if the defendant negligently fails to act, then the defendant can be held liable under Section 1986.²²⁴ Thus, when seeking municipal liability, Section 1986 offers an important strategic advantage over Section 1983. Ordinary negligence is a much lighter burden of proof than the "deliberate indifference" required by Section 1983.²²⁵

C. The Title VI Claim

Another measure against discrimination is Title VI. Codified in part at 42 U.S.C. section 2000d, it provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance."²²⁶ Although the statute does not explicitly create a private cause of action, the availability of a judicial remedy is now settled.²²⁷

222. Documentary evidence may not be an effective way to show police action. Usually, police departments will not release personnel and disciplinary records without a court order. *E.g.*, Patton, *supra* note 75, at 761. These records are confidential and can be immune from discovery. *Id.*

223. In the context of the *prima facie* case, courts usually do not discuss whether a police department had the power to prevent a conspiracy's actions. *E.g.*, Park, 120 F.3d at 1160-61; Clark, 20 F.3d at 1298. For the purposes of this paper, it is presumed that if ranking members had actual knowledge of a Section 1985 conspiracy within the police department, then those persons had the power to prevent, or aid in preventing, that conspiracy's actions.

224. Park, 120 F.3d at 1160; Clark, 20 F.3d at 1298.

225. *Supra* text accompanying notes 122-27.

226. 42 U.S.C.A. § 2000(d)(1994). The remedies and standards applicable to Title VI administrative hearings are not discussed in this paper.

227. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70 (1992). *See also* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 601 (1983) (plurality opinion) (holding that Title VI creates a private cause of action for injunctive and prospective relief); *Id.* at 612 (Rehnquist, J., concurring); *Id.* at 634 (Marshall, J., dissenting) (finding that Title VI creates a private cause of action for both equitable relief and damages); *Id.* at 638 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.); Cannon v. Univ. of Chicago, 441 U.S. 667, 696-98 & n. 21 (noting that private cause of action was available for Title VI, then holding, by analogy, that a private cause of action is available for Title IX). *See generally* Sheldon Joel Tepler, *Implying a Private Cause of Action under Title VI*, 6 U. ARK. LITTLE ROCK L.

Since most large police departments receive federal funding,²²⁸ Title VI bars them from any discrimination against minorities. A constitutional standard determines whether discrimination has occurred.²²⁹ If an action violates the Equal Protection Clause, then that action is discriminatory.²³⁰ As previously noted, to show this violation, the actor must have had a "discriminatory purpose."²³¹

This procedure is the same as for Equal Protection violations alleged under Section 1983. The principal advantage of action under Title VI is that, once discriminatory purpose is shown, the plaintiff has recourse against the program that received federal funding. Other elements of a Section 1983 case, or the possibility of immunity, are avoided.

However, Title VI's greatest advantage is the relief it offers. For example, declaratory and injunctive relief may be sought.²³² Thus, the claimants have the opportunity to help craft a remedy, suggesting structural changes that will end discrimination.²³³ In the

REV. 19 (1983). Now, a private cause of action is broadly recognized. *E.g.*, *Abramson v. Bennett*, 707 F. Supp. 13, 15 (D.D.C. 1989); *Police Officers for Equal Rights v. City of Columbus*, 644 F. Supp. 393, 438 (S.D. Ohio 1985).

228. Community Oriented Policing Services ("COPS"), United States Dep't of Justice, *Freedom of Information Act: COPS Grants Awarded by State* (May 17, 2000), available at http://www.usdoj.gov/cops/foia/foia_err.htm (providing state-by-state listing of local police departments receiving federal block grant assistance). See also 42 U.S.C.A. § 3751 (1994) (Department of Justice Drug Control and System Improvement Grant Program).

229. In *Guardians Ass'n v. Civil Service Comm'n*, a badly splintered Supreme Court found that a different standard applied to Title VI. The plurality held that "disparate impact" was sufficient to prove discrimination. *Guardians Ass'n*, 463 U.S. at 590. Under this standard, discrimination is shown if an apparently neutral program is discriminatory in practice, regardless of intent. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 645-46 (1989). This standard is also used for administrative enforcement of Title VI. *Guardians Ass'n*, 463 U.S. at 592-93. However, the constitutional standard was supported by five justices. *Id.* at 612 (Rehnquist, J., concurring) (joining in Justice Powell's adoption of a constitutional standard); *id.* at 615 (O'Connor, J., concurring); *id.* at 639 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.) Other courts subsequently recognized the constitutional standard as the rule. *E.g.*, *Craft v. Bd. of Trs. of the Univ. of Ill.*, 793 F.2d 140, 142 (7th Cir. 1986); *Latinos Unidos de Chelsea en Accion (LUCHA) v. Sec'y of Hous. and Urban Dev.*, 779 F.2d 774, 483 (1st Cir. 1986). Cf. *Sandoval v. Haban*, 197 F.3d 484, 503 (11th Cir. 1999) (finding private right of action under administrative enforcement provision of Title VI, 42 U.S.C. § 2000d-1 (1994), thus allowing litigation under disparate-impact standard).

230. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 286 (1978) (plurality opinion).

231. *Supra* text accompanying notes 97-101.

232. *Guardians Ass'n*, 463 U.S. at 596; *id.* at 638 (Stevens, J., dissenting).

233. *Id.* at 605 ("[I]t is without doubt that the portion of the order requiring

case of police misconduct, possibilities include compilation of race statistics for vehicular stops, or race awareness training for officers.²³⁴ It is unlikely, as part of an equitable remedy, that federal funding can be withdrawn.²³⁵

Compensatory damages are also available.²³⁶ Courts have not yet defined the scope of these damages. When the Supreme Court examined the issue in *Guardians Ass'n v. Civil Service Commission*,²³⁷ Justice Stevens suggested an analogy to Section 1983 actions.²³⁸ If so, Title VI compensatory damages would follow from common-law torts.²³⁹ However, punitive damages are not permitted.²⁴⁰

consultation to insure [no further] discriminatory effects constitutes permissible injunctive relief aimed at conforming respondents' future conduct to the declared law.").

234. *Infra* Parts III.D., IV.

235. *Guardians Ass'n*, 463 U.S. at 601-02. Title VI provides an administrative remedy for the withdrawal of federal funding; the plurality in *Guardians Ass'n* was reluctant to intercede. *Id.* (withdrawal of funding a "drastic" response); 42 U.S.C.A. § 2000(d-1) (1994). As a practical point, action to remove funding appears unwise. It would directly threaten police departments with the possibility of compromised services. Also, it would increase acrimony between police and civil rights advocates, whose collaboration is necessary if a plan to fight racial profiling is implemented.

236. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 70 (1992); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 630-31 (1984).

237. 463 U.S. 582 (1983).

238. *Id.* at 638 (Stevens, J., dissenting). Although not covered in detail here, attorneys' fees are available for a successful action under Title VI. 42 U.S.C.A. § 1988 (1994).

239. *Supra* text accompanying notes 144-50.

240. *Singh v. Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D.Me. 1985) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981)) ("The policies militating against an award of punitive damages against municipalities, particularly their ineffectiveness as deterrents, are no different whether the damages are sought under Title VI or under section 1983.").

D. *Strategies For Settlement*²⁴¹

For civil rights advocates, litigation is an important tool in the fight against racial profiling. Litigation creates the opportunity to investigate the problem, and it brings together people and resources. But litigation is also costly, and may forestall the resolution of underlying problems.²⁴² Thus, in the course of court action, settlement should not be overlooked.

For racial profiling cases, settlement does raise some difficulties. For instance, plaintiffs may feel that a court is the best forum for justice to be served, particularly where a jury will determine damages.²⁴³ Settlement also avoids the creation of precedents, leaving behind a still meager body of law against racial profiling.

However, settlement offers many advantages. First, it ends the adversarial relationship between civil rights advocates and police. Collaboration reaffirms the relationship between the police and the communities they serve. Conversely, drawn-out litigation may increase acrimony between police and the community. Second, the parties can craft remedies serving both parties' interests, rather than leaving this responsibility to the court. A settlement remedy allows the parties to use their resources more efficiently, and ensures that the parties' interests are represented. Third, settlement reduces the cost and duration of litigation. Issues of proof and liability are avoided, and the parties can devote energy to proposals that will effectively change police practices. The sooner the

241. This analysis is based upon settlement documents in racial profiling cases. All documents are non-confidential and on file with the author. For each proposed element of settlement below, appropriate provisions of the documents are cited. The following documents were used: Stipulation of the Parties to Settle All Issues after Approval by the Class, NAACP v. City of Carmel, (S.D. Ind. Apr. 17, 1998) (No. IP97-104C:M/S) [hereinafter *Stipulation to Settle*, NAACP v. City of Carmel]; Settlement and Monitoring Agreement and Stipulations of the Parties, NAACP v. City of Philadelphia, (E.D. Pa. 1995) (No. 96 CV 6045) [hereinafter *Settlement and Monitoring Agreement*, NAACP v. City of Philadelphia]; Consent Decree, United States v. City of Pittsburgh, (W.D. Pa. 1997) (No. 97 0354) [hereinafter *Consent Decree*, United States v. City of Pittsburgh]; Consent Decree, United States v. New Jersey, (D. N.J. 1999) (No. 99-5970(MLC)), <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> [hereinafter *Consent Decree*, United States v. New Jersey]; Settlement Agreement, Wilkins v. Maryland State Police, (D. Md. 1995) (No. MJG-93-468) [hereinafter *Settlement Agreement*, *Wilkins*]; Montgomery County Department of Police, Montgomery County, Maryland, *Memorandum of Settlement*, available at <http://www.co.mo.md.us/services/police/newsevent.htm> [hereinafter *Montgomery County Police, Memorandum of Settlement*].

242. HENRY G. MILLER, *ART OF ADVOCACY—SETTLEMENT* § 1.02 (2000).

243. *Id.* at § 1.04.

changes are implemented, the greater the benefit to the community. In sum, settlement offers many strategic advantages. Even if plaintiffs have overwhelming proof, settlement may provide a more satisfying resolution of the issues.

The following list of proposals is not exhaustive, nor is it given in any particular order of importance. The availability of different proposals will vary, depending on the relative bargaining power of the parties. In a class action suit, the parties must also be aware that a final proposal requires ratification by the members of the class.²⁴⁴

Statement of Policy. As a basis for the agreement, a policy statement defines the basic principle behind settlement: to end the use of racial profiling in law enforcement.²⁴⁵ This gesture is largely symbolic, but it ensures that police directly recognize that racial profiling is at issue, even if police do not expressly acknowledge that racial profiling has occurred.²⁴⁶

Data Collection. By requiring police to collect data on their actions, police can be monitored on their efforts to combat racial profiling. Traffic stops are the primary source for data. At minimum, the officer should record the justification for the stop, the location of the stop, the race of the persons involved, and the resolution of the stop.²⁴⁷ Other procedures may be implemented for vehicular searches and the use of drug-sniffing dogs.²⁴⁸ These pro-

244. *E.g.*, Stipulation to Settle, NAACP v. City of Carmel at 4; *see also* FED. R. CIV. P. 23(e).

245. *E.g.*, Consent Decree, United States v. New Jersey, ¶ 26; Settlement Agreement, *Wilkins*, at 3; Montgomery County Police, *Memorandum of Settlement*, at III.A.

The MCPD will continue to prohibit police officers from exercising their police powers in a manner that unlawfully discriminates against individuals based on race, national origin, gender, religion, or ethnicity. In addition ... [officers cannot] use the race or national or ethnic origin of drivers or passengers in deciding which vehicles to subject to a traffic stop ... and in deciding upon the scope or substance of any action in connection with a traffic stop

Id.

246. Some agreements include a disclaimer. Under its terms, a police department can disavow whether racial profiling occurred at any particular traffic stop. The disclaimer may also state that racial profiling is not condoned. *E.g.*, Stipulation to Settle, NAACP v. City of Carmel, at 2; Montgomery County Police, *Memorandum of Settlement*, at I.E.

247. *E.g.*, Consent Decree, United States v. City of Pittsburgh, at 11; Consent Decree, United States v. New Jersey, ¶ 29; Montgomery County Police, *Memorandum of Settlement*, at IV.B.

248. *E.g.*, Consent Decree, United States v. City of Pittsburgh, at 11; Consent

cedures should include the grounds for the intrusion, if any; if the search is consensual, written record of the consent should be included.²⁴⁹ Another possibility is the use of video and audio recording during the stops.²⁵⁰ However, limits on the extent of traffic stop recordkeeping should be recognized. The cost to implement the procedure is a consideration. Furthermore, if too much information is demanded, or procedures are too complex, then reporting may become less reliable.

Access to police personnel records may also be sought.²⁵¹ This access may specifically include records on training, disciplinary actions, use of force, and racial incidents.²⁵² However, a proposal of this sort is very broad, and police departments are reluctant to disclose personnel records.²⁵³

If records are obtained, they can form the basis for litigation. For example, records may indicate discriminatory purpose by individual officers or discriminatory custom by the police department. As a result, liability would arise under Section 1983 for violations of the Equal Protection Clause.²⁵⁴ But tactical advantages in future litigation cannot form the primary basis for settlement. Rather, the information should be used in a way that will constructively suggest changes in police practice. Thus, it may be prudent to disallow use of the offered records in future litigation against individual officers.²⁵⁵ Instead, records may indirectly identify problem areas, or

Decree, *United States v. New Jersey*, ¶ 29; Settlement Agreement, *Wilkins*, at 4; Montgomery County Police, *Memorandum of Settlement*, at IV.B.

249. *E.g.*, Consent Decree, *United States v. City of Pittsburgh*, at 11; Consent Decree, *United States v. New Jersey*, ¶ 29; Montgomery County Police, *Memorandum of Settlement* at IV.B.

250. *E.g.*, Stipulation to Settle, *NAACP v. City of Carmel*, at 7; Consent Decree, *United States v. New Jersey*, ¶ 34.

251. *E.g.*, Settlement and Monitoring Agreement, *NAACP v. City of Philadelphia*, at 2; Consent Decree, *United States v. City of Pittsburgh*, at 6.

252. *E.g.*, Settlement and Monitoring Agreement, *NAACP v. City of Philadelphia*, at 2; Consent Decree, *United States v. City of Pittsburgh*, at 13 ("The City shall conduct regular audits and reviews of potential racial bias, including use of racial epithets, by all officers.").

253. Patton, *supra* note 75, at 761.

254. *Supra* text accompanying notes 97-101, 122-27.

255. *E.g.*, Consent Decree, *United States v. New Jersey*, ¶ 29; Montgomery County Police, *Memorandum of Settlement*, at IV.B. Several other reasons support limited use of records in future litigation. If individual officers have assurance that records will not be used against them, then those officers have greater incentive to fully participate in recordkeeping. The proposal also builds trust, assuring that records will be used to further common goals of both police and civil rights advocates. Police departments may also be more willing to provide greater access to

ganized by precinct or neighborhood.

To help evaluate information, any data collection proposal should require a computerized system.²⁵⁶ This requirement helps ensure uniform procedures, as well as ready access for persons evaluating the police department's efforts against racial profiling.

Police Conduct; Training Initiatives. A settlement may also seek direct changes in police conduct. For instance, in the course of a traffic stop, police may be required to identify themselves and to state grounds for the stop.²⁵⁷ But to encourage long-term change, training initiatives offer a better means for ending discriminatory conduct. Aside from promulgation of policy against racial profiling, areas for focus include cultural awareness, communications skills, and "incident de-escalation" techniques.²⁵⁸ An expert may also be retained to evaluate training needs and set a curriculum.²⁵⁹

Community Outreach. A settlement may create a framework for community outreach, either by police²⁶⁰ or through an independent agency.²⁶¹ Several goals are served through community outreach. It informs the community of its rights during interactions with police.²⁶² It can also provide a way to collect and evaluate complaints against police.²⁶³

The success of outreach depends on effective communication with the community. As a first step, an outreach proposal may include a joint press release or press conference at the completion of

records.

256. *E.g.*, Settlement and Monitoring Agreement, NAACP v. City of Philadelphia, at 2; Settlement Agreement, *Wilkins*, at 4; Montgomery County Police, *Memorandum of Settlement*, at IV.G.

257. *E.g.*, Montgomery County Police, *Memorandum of Settlement*, at V.C. *See also* *infra* text accompanying notes 292-94.

258. *E.g.*, Consent Decree, United States v. City of Pittsburgh, at 20; Consent Decree, United States v. New Jersey, ¶ 100; Montgomery County Police, *Memorandum of Settlement*, at VII.B.

259. *E.g.*, Montgomery County Police, *Memorandum of Settlement*, at VII.A.

260. *Id.* at V.A., VI.A.

261. *E.g.*, Consent Decree, United States v. New Jersey, ¶ 62.

262. *Id.* at ¶ 60; Montgomery County Police, *Memorandum of Settlement*, at V.A. (promising to "explain the duties and responsibilities of police officers, the dangers of the job, the reasons behind practices designed to promote officer safety (but which might be misunderstood by the public), and other issues involving traffic stops, arrests, searches and seizures"). If police choose to do community outreach, civil rights advocates should seek an approach that explains both police power and individual rights, rather than simply justifying police powers.

263. *E.g.*, Consent Decree, United States v. New Jersey, ¶ 62; Montgomery County Police, *Memorandum of Settlement*, at VI.A.

the settlement.²⁶⁴ To ensure continued awareness, an advertising or media strategy should also be considered.

Monitoring and Enforcement. To ensure continued compliance with the terms of settlement, there are several methods by which a police department can be monitored. One possibility is periodic, written status reports by the police department on its actions against racial profiling.²⁶⁵ Or, representatives for the plaintiffs may arrange direct meetings with the police department to discuss compliance issues.²⁶⁶ The parties might also opt for an auditor or other neutral third party, selected by agreement of the parties, to track and evaluate police compliance.²⁶⁷

Regardless of which overview mechanism is used, the proposal should allow open access to records, particularly if new procedures are implemented to track racial profiling.²⁶⁸ Thus, plaintiffs can evaluate whether substantial progress toward compliance is being made. As a last resort, the agreement should provide an equitable remedy through the courts.²⁶⁹

A settlement should also provide a fixed duration for implementation of its terms. This period varies from two to five years.²⁷⁰ By imposing a time limit, the settlement creates a time frame in which substantial results are required. It also forces the long-term allocation of police resources to combat racial profiling. If the use of these resources is established, then even after the settlement period ends, police departments may be encouraged to continue the program. If the program is shown to reduce incidents of police misconduct, thus reducing further investigation or litigation, then the program may pay for itself. Conversely, if programs are ineffec-

264. *E.g.*, Stipulation to Settle, NAACP v. City of Carmel, at 10.

265. *E.g.*, Settlement and Monitoring Agreement, NAACP v. City of Philadelphia, at 2.

266. *E.g.*, Stipulation to Settle, NAACP v. City of Carmel, at 9.

267. *E.g.*, Consent Decree, United States v. City of Pittsburgh, at 32-33; Consent Decree, United States v. New Jersey, ¶ 115; Montgomery County Police, *Memorandum of Settlement*, at VIII.A.

268. *E.g.*, Consent Decree, United States v. City of Pittsburgh, at 33; Consent Decree, United States v. New Jersey, ¶ 118; Montgomery County Police, *Memorandum of Settlement*, at VIII.D.; *see also supra* text accompanying notes 247-56.

269. *E.g.*, Stipulation to Settle, NAACP v. City of Carmel, at 9; Settlement Agreement, *Wilkins*, at 6.

270. *E.g.*, Stipulation to Settle, NAACP v. City of Carmel, at 7 (three and a half years); Settlement and Monitoring Agreement, NAACP v. City of Philadelphia, at 3 (two years); Consent Decree, United States v. City of Pittsburgh, at 37 (five years); Consent Decree, United States v. New Jersey, ¶ 131 (five years, but subject to reduction for two years' "substantial compliance").

tive or are not competently administered, a durational limit reopens the possibility of litigation.

Damages and Attorneys' Fees. Money awards are rarely provided for in racial profiling settlements. Damages may be suitable for a small number of plaintiffs,²⁷¹ but not in a class action. By limiting recovery of damages in settlement, plaintiffs can ensure that public resources are instead spent on changes in law enforcement. Attorneys' fees have also been considered in settlement.²⁷²

IV. LEGISLATION

Litigation is not the only recourse for communities affected by racial profiling. State legislatures and city councils offer another forum for action. By working for laws and ordinances that fight racial profiling, community advocates can achieve change without the cost and acrimony of litigation. The following section examines laws and other legislative proposals dealing with racial profiling. These proposals can help form the groundwork for action at the community level.

At least six states have enacted laws against racial profiling.²⁷³ Using Missouri's statute as a model, basic features of racial profiling legislation will be examined. Then, some more novel measures will be discussed.

The central feature of the Missouri law is collection of race data on traffic stops.²⁷⁴ Aside from the race of the persons stopped, the officer must also record the alleged violation and indicate how

271. *E.g.*, Settlement Agreement, *Wilkins*, at 7 (awarding each plaintiff \$12,500, for a total of \$50,000).

272. *E.g.*, Stipulation to Settle, *NAACP v. City of Carmel*, at 3 (referring to separate, confidential settlement for damages and attorneys' fees); Settlement Agreement, *Wilkins*, at 7.

273. N.C. GEN. STAT. § 114-10 (1999), *amended by* Act effective August 1, 2000, ch. 67, sec. 17.2(a), 2000 N.C. Sess. Laws ____; Act of June 5, 2000, ch. 325, 2000 Okla. Sess. Laws Serv. 1489 (West) (to be codified at OKLA. STAT. tit. 22 §§ 34.3, 34.4, 34.5); Act of May 30, 2000, S.B. 1053, 2000 Mo. Legis. Serv. ____ (West) (to be codified at MO. REV. STAT. §§ 590.650, 590.653); Act of March 24, 2000, ch. 118, 2000 Wash. Laws Legis. Serv. ____ (West) (to be codified at WASH. REV. CODE § 43.43); Act of June 23, 1999, P.A. No. 99-198, 1999 Conn. Acts ____ (Reg. Sess.) (reprinted at CONN. GEN. STAT. ANN. APP. PAMPHLET at 117 (West 2000)); Traffic Stops Statistics Act, ch. 00-251, 2000 R.I. Pub. Laws ____ (to be codified at R.I. GEN. LAWS § 31.21.1).

274. Act of May 30, 2000, S.B. 1053, 2000 Mo. Legis. Serv. ____, ____ (West) (to be codified at MO. REV. STAT. §§ 590.650, 590.653). *See also supra* text accompanying notes 247-56 (discussing proposals for recordkeeping as part of a settlement agreement).

the violation was resolved, including the content of a citation or criminal charges.²⁷⁵ If a search is conducted, grounds for the search—whether by consent or probable cause—are recorded, and the officer must note the result of the search.²⁷⁶ The location of the stop is also included.²⁷⁷

On an annual basis, law enforcement agencies are required to report the data to the state attorney general.²⁷⁸ The attorney general, in turn, issues a summary of the findings.²⁷⁹ The summary must compare the proportion of minorities stopped to the population at large.²⁸⁰

Other states' laws have similar collection and reporting mechanisms.²⁸¹ This information can be used to help show discriminatory custom in police departments.²⁸² But Missouri also uses the records to establish patterns of behavior by individual officers.²⁸³ If a pattern of racial profiling is found, then the officer is required to undergo additional training or counseling.²⁸⁴

Most racial profiling laws do not provide a course of action for noncompliance with data collection rules. However, under the Missouri law, police departments can be penalized by withdrawal of

275. Act of May 30, 2000, S.B. 1053, 2000 Mo. Legis. Serv. __, __ (West) (to be codified at MO. REV. STAT. §§ 590.650, 590.653).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. N.C. GEN. STAT. § 114-10(2a)(1999), *amended by* Act effective August 1, 2000, ch. 67, sec. 17.2(a), 2000 N.C. Sess. Laws __; Act of June 23, 1999, P.A. No. 99-198, 1999 Conn. Acts __ (Reg. Sess.) (*reprinted at* CONN. GEN. STAT. ANN. APPENDIX PAMPHLET at 117 (West 2000)); Traffic Stops Statistics Act, ch. 00-251, 2000 R.I. Pub. Laws __ (to be codified at R.I. GEN. LAWS § 31.21.1). *See also* Act of March 24, 2000, ch. 118, 2000 Wash. Legis. Serv. __ (West) (requiring record-keeping by state patrol and "encouraging" voluntary data collection by municipal and county police); Traffic Stops Statistics Study Act of 1999, H.R. 1443, 106th Cong. § 2 (proposing a study of traffic stops statistics, with the Attorney General using a nationwide sample of jurisdictions). One state, Rhode Island, expressly requires that individual officers' records are kept confidential. Traffic Stops Statistics Act, ch. 00-251, 2000 R.I. Pub. Laws __; *see also* Traffic Stops Study Act of 1999, H.R. 1443, 106th Cong. § 4; S.B. 1389, 2000 Cal. Legis. § 1(b), <http://www.leginfo.ca.gov/cgi-bin/postquery?billnumber=sb1389&sess=cur&house=B> (spaces between "bill" and "number," and between "sb" and "1389"). For a discussion of the rationale behind confidentiality, *see supra* note 255.

282. *Supra* text accompanying notes 97-101, 122-27.

283. Act of May 30, 2000, S.B. 1053, 2000 Mo. Legis. Serv. __, __ (West).

284. *Id.*

state funding.²⁸⁵ Although the penalty may be harsh,²⁸⁶ it may also prompt action where police departments resist programs against racial profiling.

The Missouri law also encourages creation of civilian review boards over police departments.²⁸⁷ The law gives the boards broad power to collect complaints, conduct investigations, and recommend remedies.²⁸⁸ However, the statute disallows compensation for members of the boards.²⁸⁹

Whether an uncompensated review board can professionally manage and investigate police misconduct is a matter of dispute.²⁹⁰ But an independent board can serve important needs. As opposed to police "internal affairs" units, an independent board is autonomous. Thus, persons affected by police misconduct are more likely to step forward.²⁹¹ One possible compromise is to have civilian review boards without investigatory powers. The board would act as a liaison on behalf of the community. If police misconduct is alleged, the board could then order an investigation from a neutral party, such as the attorney general or some other state-funded agency. The board would also interact with police, discussing general concerns of the community.

Other states have proposed different solutions to racial profiling, but it is questionable whether these solutions can be effective. For example, the California Legislature is considering whether police identification will reduce racial profiling.²⁹² Under its proposal, police are required to give their business card to any person they pull over without a subsequent citation or arrest.²⁹³ Since even minor traffic infractions may justify a traffic stop,²⁹⁴ police could avoid identifying themselves by issuing a citation. Even if police were re-

285. *Id.*; see also Act of June 23, 1999, P.A. No. 99-198, 1999 Conn. Acts ____ (Reg. Sess.) (reprinted at CONN. GEN. STAT. ANN. APPENDIX PAMPHLET at 117 (West 2000)).

286. A penalty can increase resistance to change, or it can reduce the quality of law enforcement for the surrounding community. See *supra* note 235.

287. Act of May 30, 2000, S.B. 1053, 2000 Mo. Legis. Serv. ____, __ (West).

288. *Id.*

289. *Id.*

290. Hazel Glenn Beh, *Municipal Liability for Failure to Investigate Citizen Complaints Against Police*, 25 FORDHAM URB. L. J. 209, 220-21 (1998).

291. *Id.* at 220.

292. S.B. 66, 2000 Cal. Legis. § 1(d), available at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_66&sess=cur&house=B (spaces between "bill" and "number," and between "sb" and "66").

293. *Id.*

294. *Supra* text accompanying notes 26-29.

quired to identify themselves at every stop, enforcement would be difficult. Motorists are in a vulnerable position during a traffic stop and are unlikely to demand identification. In addition, a demand for identification could increase tension during the stop.

Legislation can balance the power police hold during traffic stops. It provides a direct opportunity to implement action against racial profiling, whether at the state or local level. Even if proposed ordinances are not passed, lobbying against racial profiling can increase organizational clout and public awareness. Furthermore, concerted action may encourage police to make changes on their own.²⁹⁵ Thus, legislation, and the legislative process, is an important form of action against racial profiling.

V. CONCLUSION

"Driving While Black" has recently become the focus of wide attention in the media. But racial profiling is a long-term problem. It insults the dignity of persons of color, creating fundamental distrust with police. It wastes law enforcement resources, on the false premise that blacks and hispanics are more likely to be criminals. There is no longer any dispute that racial profiling affects our communities; now, it is necessary to end profiling and restore trust between police and persons of color.

Racial profiling is an abuse of police power. Therefore, any plan to combat the problem should examine the dimensions of police power. When this power stops serving the community it is intended to protect, limitations must be imposed. It is up to the community to determine the scope of police power, and communicate what the limits are.

The mode of communication affects the success of the message. Demands for relief in the courts can raise public awareness, as well as redress the injuries of those directly harmed by racial profiling. Proposals in a state legislature or city council can suggest institutional changes. But direct dialogue offers the greatest potential for change. A lawsuit may draw police attention, but resolution requires collaboration between police and the communities they serve. When both groups take positive steps to end racial profiling, then a foundation of trust can be rebuilt.

295. For example, many police departments have begun voluntary collection of race data for investigatory stops. Harris, *Driving While Black*, *supra* note 1, at 322-23.